

Rosyatimah bte Neza v Pengarah Penjara, Pulau Pinang

HIGH COURT (IPOH) — CRIMINAL APPLICATION NO
44(54)-2-89
ABDUL MALEK J
16 DECEMBER 1989

Criminal Procedure — Sentencing — Accused sentenced under wrong section — Illegality of imprisonment

The applicant had been found guilty on a reduced charge of possession under s 6 of the Dangerous Drugs Act 1952 and was sentenced to ten years' jail with effect from the date of arrest, ie 20 September 1984. It was subsequently pointed out to the judge that he had wrongly used s 39A of the Act as the punishment section as it had come into force only on 1 January 1987. On the date of the offence, the maximum sentence for possession under s 6 was five years' jail. With one-third remission, the date of the applicant's release would have been 20 January 1988. The trial judge had admitted this error both in his grounds of judgment and letter to the parties. [See [1989] 1 MLJ 360, 367]. The warrant of commitment, however, was not altered. The applicant applied for a writ of habeas corpus.

Held, allowing the application:

The trial court had found the applicant guilty of possession under s 6 of the Act on 22 August 1988. The maximum sentence is only five years' jail on the date of the offence. The failure to amend the warrant of commitment does not legalize the illegal sentence.

[Editorial Note: The respondent has appealed to the Supreme Court vide Criminal Appeal No 05-176 of 1989.]

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 39A

Gurbachan Singh and Kartar Singh for the applicant.

Mohd Zaki bin Yassin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Abdul Malek J: The applicant had been charged for trafficking in 392g of cannabis on 20 September 1984 with another accused. The other accused was acquitted and discharged at the close of the prosecution's case but the defence of the applicant was called.

On 22 August 1988, the trial court found her guilty on a reduced charge of possession under s 6 of the Dangerous Drugs Act 1952 (hereinafter 'the Act'). She was sentenced to 10 years' jail with effect from the date of arrest, that is 20 September 1984. With one-third remission, the release date would be 20 May 1991. However, it was subsequently pointed out to the trial judge that he had wrongly used s 39A of the Act as the punishment section as it had come into force only on 1 January 1987. On the date of the offence, the maximum sentence for possession under s 6 was five years' jail. With one-third remission, the date of release would have been 20 January 1988. The trial judge had admitted this error both in his grounds of judgment

A and his letter to the parties. However, the warrant of commitment had not been altered.

In view of the appeals by the public prosecutor and the applicant, the Supreme Court had fixed this matter three times but have now adjourned it to 2 January 1990 to have the appeal record served on the other accused before the appeals can be heard. This application had been filed on 20 January 1989 but the same trial judge had thought it fit to await the decision of the Supreme Court appeals before hearing this application.

This court today is only concerned as to whether the applicant is being detained illegally. Having heard the submissions and considered the authorities, this court is of the view that:

- (a) the trial court had found the applicant guilty of possession under s 6 of the Act on 22 August 1988;
- (b) the maximum sentence is only five years' jail on the date of the offence;
- (c) the trial judge had admitted his error in his grounds of judgment as to wrongly sentencing the applicant on 22 August 1988 to ten years' jail with effect from the date of arrest;
- (d) the failure to amend the warrant of commitment does not in any way legalize the illegal sentence; and
- (e) as such, the applicant should have been released on the date of the sentence, that is, 22 August 1988 as 2/3 on the five-year sentence had expired on 20 January 1988.

F As she is being detained under an illegal sentence, and as on this date her conviction under s 6 of the Act still stands, the court would grant her application for a writ of habeas corpus and order that she be set free.

Application allowed.

G Solicitors: *Bachan & Kartar*.

Reported by *Zarinah Marican*